Supreme Court, U.S.
FILED
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92-509

No. _____

In The

Supreme Court of the United States

October Term, 1992

IRVIN FRANK BENNING,

Petitioner,

v.

STATE OF IOWA and H.L. HOLLANDER,

Respondents.

Petition For A Writ Of Certiorari To The Iowa Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a State, or an official of the State acting in his or her official capacity, is a "person" within the meaning of 42 U.S.C. § 1983?

TABLE OF CONTENTS

Page

Question Presented i

Opinions Below 1

Jurisdiction 2

Statutory Provisions Involved 2

Statement 2

Reasons for Granting Writ 4

I. A State, or an officer of the State, while acting in his or her official capacity, is a "person" within the meaning of 42 U.S.C. § 1983 and a majority in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) must be reversed 5

Conclusion 7

Appendix A A-1

Appendix B B-1

TABLE OF AUTHORITIES

Page

CASES

Brandon v. Holt, 469 U.S. 646 (1985) 6

Gomez v. Toledo, 446 U.S. 635 (1980) 6

Owen v. City of Independence, 445 U.S. 622 (1980) 6

Will v. Michigan Department of State Police, 491 U.S. 58 (1989) 4, 5, 6

STATUTES AND OTHER AUTHORITIES

28 U.S.C. § 1257(3) 2

42 U.S.C. § 1983 ..... *passim*

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PETITION FOR A WRIT OF CERTIORARI

Petitioner requests that a Writ of Certiorari issue to review the judgment of the Iowa Supreme Court affirming a decision of the Iowa District Court in and for Hardin County.

OPINIONS BELOW

The judgment of the Iowa Supreme Court (Appendix A) is unreported as is the Order of the District Court (Appendix B). A parallel case, *Benning v. Iowa Department of Transportation*, reported at 441 N.W.2d 372 (Iowa 1989) also arose out of the same facts as the instant case.

JURISDICTION

The final judgment of the Iowa Supreme Court was entered on June 25, 1992. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

This case concerns the construction and question of whether a State, or an official of the State while acting in his or her official capacity, is a "person" within the meaning of 42 U.S.C. § 1983.

STATEMENT

On January 27, 1989 Petitioner filed a tort claim with the Iowa State Appeal Board arising out of the stop of Petitioner's motor vehicle by Respondent, H.L. Hollander, for operating a motor vehicle while under the influence of alcohol and for interference with official acts occurring on January 27, 1987. During the late evening hours or early morning hours of January 27, 1987 the Petitioner was operating his motor vehicle in the town of Iowa Falls, Iowa. After Mr. Benning stopped for a stop sign he made a right turn and was pulled over by Respondent H.L. Hollander, an Iowa State Highway Trooper. Respondent Hollander asked Petitioner to perform certain field sobriety tests and after he did so, Respondent Hollander asked him to blow into an alcosensor. The Petitioner refused to do so because he did not

trust Respondent Hollander because Respondent Hollander had already called Petitioner a liar and told him he had flunked the field sobriety test. Petitioner was then placed under arrest for operating while intoxicated. Petitioner asked to be transported to a hospital for a blood test and Respondent Hollander refused. After being transported to the Iowa Falls police station, Petitioner asked for a blood test on a number of occasions and was finally transported to the hospital.

A doctor performed a neurological examination upon Petitioner which was negative. After the neurological examination the doctor had a blood specimen withdrawn from Petitioner for an alcohol analysis. The result of said blood analysis was that the blood alcohol content of Petitioner's blood was .043%.[1]

Following the Petitioner's arrest, charges of operating while intoxicated and interference with official acts and a traffic citation charging Petitioner with failing to stop at a stop sign were all dismissed.

The Petitioner's claims were denied by the appeal board and on December 27, 1987 Petitioner filed a Petition at Law naming the State of Iowa and H.L. Hollander as Defendants (Division I of the Petition at Law alleged causes of action based upon 42 U.S.C. § 1983 and § 1988 against both Respondent Hollander and Respondent State of Iowa.)

---

[1] Iowa Code § 321J.2 (1987) provides that it is unlawful to operate a motor vehicle while under the influence of an alcoholic beverage or other drug, or a combination of said substances, while having ten hundredths (.10%) or more alcohol concentration.

Prior to trial, Respondents filed a Motion for Summary Judgment requesting that summary judgment be granted in both Respondents' favor on all Counts of each Division of Petitioner's Petition. On October 5, 1990 the District Court granted Respondents' Motion for Summary Judgment in all respects, except as to the allegations of Count VI of Division II of the Petitioner's Petition. One of the claims of Petitioner that was dismissed was the 42 U.S.C. § 1983 action against Respondent State of Iowa in Division II. In dismissing Petitioner's claim the District Court relied upon this Court's holding in *Will v. Michigan Department of State Police*, 991 U.S. 58 (1989). (Appendix B).

Respondent Hollander subsequently filed a second Motion for Summary Judgment which was granted. Petitioner filed his Notice of Appeal to the Iowa Supreme Court. On June 25, 1992, a final decision from the Iowa Supreme Court was entered. (Appendix A).

REASONS FOR GRANTING WRIT

Certiorari should be granted in order to revisit an important issue of whether a State, or an official of the State while acting in his or her official capacity, is a "person" within the meaning of 42 U.S.C. § 1983 which was decided before this Court in the case of *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989).

I

A STATE, OR AN OFFICER OF THE STATE, WHILE ACTING IN HIS OR HER OFFICIAL CAPACITY, IS A "PERSON" WITHIN THE MEANING OF 42 U.S.C. § 1983 AND A MAJORITY IN *WILL v. MICHIGAN DEPARTMENT OF STATE POLICE*, 491 U.S. 58 (1989) MUST BE REVERSED.

In 1989, this Court in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) held that neither a State nor its officials acting in their official capacities are "persons" under § 1983 in a State Court and a suit for damages. The Petitioner contends that this Court in its decision in *Will* erred in its determination that a State nor its officials acting in their official capacities are persons. 42 U.S.C. § 1983 provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any act of congress applicable exclusively to the District of Columbia, shall be considered a statute of District of Columbia."

42 U.S.C. § 1983 provides a Federal cause of action. It is a vehicle to litigate Federal Constitution and statutory claims, primarily against State and local governments and their officers.

Section 1983 reflects a congressional judgment that a "damages" remedy against the offending party is a vital component of any scheme of vindicating cherished constitutional guarantees. *Owen v. City of Independence*, 445 U.S. 622 (1980); *Gomez v. Toledo*, 446 U.S. 635 (1980).

By the plain terms of § 1983, two (2) allegations are required in order to sustain the cause of action under that statute. First, the Plaintiff must allege that some person has deprived him of a Federal right. Second, he must allege that person who has deprived him of that right has acted under color of State or territorial law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Personal-capacity suits seek to impose a personal liability upon a government officer for actions he takes under color of State law. *Brandon v. Holt*, 469 U.S. 646 (1985).

The Petitioner submits that Justice Steven's dissent in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) is a more logical reasoned opinion than that of the majority because as he stated:

> The Civil Rights Act of 1871 was "intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell v. New York City Department of Social Services*, 436 U.S. at 700-01, 56 L. Ed. 2d 611, 98 S.Ct. 2018. Our holdings that a § 1983 action can be brought against State officials in their official capacity for constitutional violations properly recognized and are properly faithful to that profound mandate. If prospective relief can be awarded against State officials under § 1983 and the State is the real party in interest in such suits, the State must be a "person" which can be held liable under

> § 1983. No other conclusion is available. Eleventh Amendment principles may limit the State's capacity to be sued as such in Federal Court. See *Alabama v. Pugh*, 438 U.S. 781, 57 L.Ed.2d 1114, 98 S.Ct. 3057 (1978). But since these principles are not applicable to suits in State Court, see *Thiboutot, supra*, at 9, n 7, 65 L.Ed.2d 555, 100 S.Ct. 2502; *Nevada v. Hall*, 440 U.S. 410, 59 L.Ed.2d 416, 99 S.Ct. 1182 (1979), there is no need to resort to fiction of an official-capacity suit and the State may and should be named directly as a Defendant in a 1983 action. *Will* at 491 U.S. 58, 92.

Justice Stevens went on to note the illogical conclusion of the majority that a State official in his or her official capacity, when sued for injunctive relief would be a person under § 1983 while that same person sued in that same official capacity is not a person when the Plaintiff seeks monetary relief. Finally, Justice Stevens points out another illogical distinction made by the majority by its distinction between wrongs committed by county or municipal officials on the one hand and those committed by State officials on the other.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF IOWA

No. 91-1573

Hardin County No. 74-276-1289

ORDER

IRVIN FRANK BENNING, (Filed Jun. 25, 1992)
Plaintiff-Appellant,

vs.

H.L. HOLLANDER,
Defendant-Appellee.

This matter is before the court Larson, Carter, and Lavorato, JJ., participating. The court considers the hand-written document filed by the appellant on June 3, 1992, as an application for reconsideration of an order entered by a single justice of this court. The court has considered this application as well as the resistance thereto filed by the appellee. Appellant's application for reinstatement of his appeal is denied.

Dated this 25th day of June, 1992.

THE SUPREME COURT OF IOWA

By /s/ James H. Carter
James H. Carter, Justice

APPENDIX B

IN THE IOWA DISTRICT COURT
FOR HARDIN COUNTY

IRVIN FRANK BENNING, Plaintiff, vs. STATE OF IOWA and H. L. HOLLANDER, Defendants.	Cause No. 74-276-1289 ORDER (Filed Oct. 5, 1990)

Hearing is held on the Motion for Summary Judgment filed by the Defendants herein. The Movants appear by counsel, Robert Wilson, Assistant Attorney General. The Plaintiff appears by counsel, Joseph G. Bertogli.

The usual principles applicable to the consideration of a Motion for Summary Judgment are applied.

R.C.P. 237 provides the Rule in Iowa on summary judgments.

In *Daboll v. Hoden*, 222 N.W.2d 727 (Iowa 1974), the Iowa Supreme Court stated:

> "The purpose of the rule is to avoid useless trials. Where there is no genuine issue of fact to be decided, the party with a just cause should be able to obtain a judgment promptly and without the expense and delay of a trial. [citations] In ruling on a motion for summary judgment, the court's function is to determine whether such a genuine issue exists, not to decide the merits of one which does.

Id. at 731. In order to rule upon such motion, the trial court must examine the entire record before it, including the pleadings, admissions, depositions, answers to interrogatories, and affidavits, if any. *Drainage Dist. No. 119 v. Incorporated City of Spencer,* 268 N.W.2d 493, 499 (Iowa 1978). The burden to show the absence of any genuine issue of material fact is upon the moving party. The record is viewed in the light most favorable to the opposing party. *Swets Motor Sales, Inc. v. Pruisner,* 236 N.W.2d 299, 304 (Iowa 1975). However, to successfully resist a motion for summary judgment, the resisting party must set forth specific evidentiary facts showing the existence of a genuine issue of material fact. *Liska v. First Nat. Bank,* 310 N.W.2d 531, 534 (Iowa Ct. App. 1981). He cannot rest on the mere allegations or denials of the pleadings. Id.; Iowa R.Civ.P. 237(c).

Considering first Division I of the Plaintiff's Petition:

The Plaintiff makes no claim against the State of Iowa in Division I. In response to the brief of the Defendants, the Plaintiff admits there is no jurisdiction of H. L. Hollander on Counts II, III, and V of Division I.

In Count I of Division I, the Plaintiff has asserted a claim of negligence against H. L. Hollander, and states that the claim is viable because the Defendant H. L. Hollander was *not* acting within the scope of employment and *not* within his official capacity (see, Plaintiff's Brief, page 5 and 6). The brief limits the arguments concerning the elements of negligence to a claim that Hollander (a) negligently failed to follow proper procedures in detaining and arresting the Plaintiff; (b) made certain omissions of fact and certain representations issuing the Plaintiff

notice of revocation of his license to drive and register vehicle; (c) negligently failed to provide complete and accurate information as required by an authorized person.

Defendant has submitted documentation to support the assertion that Hollander was acting within the scope of his employment and in his official capacity (affidavit of H. L. Hollander with attached officer's Report).

Section 613A.12 of the Code of Iowa provides:

> "All officers and employees of municipalities are not personally liable for claims which are exempted under Section 613A.4, except claims for punitive damages, and actions permitted under Section 85.20. An officer or employee of a municipality is not liable for punitive damages as a result of acts in the performance of a duty, unless actual malice or willful, wanton, and reckless misconduct is proven."

Thus, unless the Plaintiff has set forth specific facts refuting the affidavit that Hollander was acting witin [sic] the scope of employment and in his official capacity creating a genuine issue for trial, there is no remaining issue to resolve in these proceedings. The resisting party may not rely solely on legal conclusions to show that there is no genuine issue of material fact justifying denial of summary judgment. *Amco Insurance Co. v. Stammer,* 411 N.W.2d 709, 711 (Iowa App. 1987).

The Plaintiff relies on a "transcript" of proceedings taken before an administrative agency in a related case, and asks the Court to take judicial notice of that transcript. The Court must examine the entire record before, it including the pleadings, admissions, depositions,

answers to interrogatories, and affidavits, if any. *Matter of the Estate of Henrich,* 389 N.W.2d 78, 80 (Iowa App. 1986). Ignoring for the moment the issue whether the document is properly before the Court in this summary judgment proceedings, the Court has examined the transcript and can find no statement or evidence therein to support a conclusion, considering the materials most favorable to the party opposing the summary judgment, to suggest that the officer was not acting within the scope of his employment and not in his official capacity. The transcript does not assert or imply that Trooper Hollander was not functioning as a peace officer, nor that he was making a stop of the Plaintiff while not acting within the scope of his employment. In fact, it confirms to the contrary. More than a "scintilla" of evidence is required to generate a genuine issue of material fact. *Matter of Estate of Henrich,* supra.

While the Plaintiff has avoided the specific language referred to in Section 25A.14(4) of the Code of Iowa which excepts immunity on certain specified claims, there is no factual data presented by the Plaintiff to suggest that the claim in Count I and Count IV of Division I are not claims arising out of the arrest of the Plaintiff by the Defendant H. L. Hollander. It is the stop and arrest which initiates the entire scenario thereafter. The Defendant supports, by affidavit, that the officer was acting within the scope of his employment and in his official capacity. That is an objective determination. With the lack of objective documentation to the contrary, the conclusion is that there is no material issue of fact in these proceedings to allow the Court to have jurisdiction of any claim against the employee under the provisions of Chapter 25A of the

Code of Iowa under the claim made in Count I and Count IV of Division I. While the parties are not mandated to file opposing affidavits, the failure to do so may be fatal to the party resisting the Motion for Summary Judgment relying on a perceived weakness in the movant's contention. *Suss v. Schammel,* 375 N.W.2d 252, 255 (Iowa 1985).

In Count VI of Division I, the Plaintiff asserts a claim against H. L. Hollander under 42 U.S.C. Section 1983, 1988.

In Division I of the Plaintiff's Petition, the Plaintiff asserts an action individually against Defendant H. L. Hollander and states in paragraph 2 of the "factual allegation" that the Defendant (apparently referring to H. L. Hollander in his individual capacity) at all times material hereto was employed by the Iowa State Department of Public Safety and that the actions complained of were *not* within the scope of his employment and *not* in his official capacity."

If this were before this Court on a Motion to Dismiss, the recent case of *Harrington v. Schossow,* 457 N.W.2d 583 (Iowa 1990) would justify preserving this action against the individual H. L. Hollander on this Count. A significant distinction exists in these proceedings contrasted with the proceedings in *Harrington v. Schossow.* The matter in *Harrington v. Schossow* was decided on a Motion to Dismiss. The resolution of a Motion to Dismiss is based on an interpretation of the pleadings construing them in the light most favorable to the pleader and resolving all doubts and ambiguities in the pleader's favor. *Stessman v. American Blackhawk Broadcasting,* 416 N.W.2d 685, 687 (Iowa 1987). *Harrington* concluded that, based on the

pleadings, the Court has jurisdiction of the individual in a 1983 action. The proceedings are before this Court on a Motion for Summary Judgment. The determination to be made is whether there is a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The determination is based upon the entire record before the Court, including the pleadings, admissions, depositions, answers, interrogatories, and affidavits, if any. *Matter of Estate of Henrich,* supra. As previously stated, there is [sic] no documents, affidavits, or other court papers to support the assertion of the Plaintiff that the Defendant H. L. Hollander was *not* acting within the scope of his employment or in his official capacity. The Plaintiff in some manner in Division I is relying on an allegation that Hollander, *not* acting within the scope of his employment and *not* in his official capacity but under color of state law, can recover in a Section 1983 action. Absent any such support, the Section 1983 proof of the action asserted in Division I against H. L. Hollander must necessarily fail.

In Division II, the Plaintiff asserts that H. L. Hollander *was* acting within the scope of his employment and *was* in his official capacity at all times pertinent to the claims raised in Division II and asserts claims against Hollander individually and against the State of Iowa.

Section 613A.12 exempts officers or employees of municipalities for claims exempted under Section 613A.4, as well as exempting the State liability for such claims. The claims under Count [sic] I, II, III, and IV are within the gambit of the claim identified in Section 25A.14(4) of the Code of Iowa for the reasons hereinbefore set forth.

States are not persons for purposes of Section 1983 litigation under the holding in *Will v. Michigan Department of State Police*, ___ U.S. ___, 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45, 57 (1989). Thus, the Section 1983 action against the State of Iowa in Division II is subject to a Motion for Summary Judgment.

Plaintiff cites the dissent in *Wall v. Michigan Department of State Police* and asks the Court to apply that conclusion rather than the conclusion in the majority opinion. The Court determines that there is no reason to conclude the majority opinion is in error.

Division II, Count VI asserts a claim under 42 U.S.C., Section 1983, against H. L. Hollander individually. The factual averment for Division II alleges that Hollander was acting within the scope of his employment and in his official capacity. Paragraph 3 of Count VI alleges that he was acting "under color of State law" when he deprived Plaintiff of his constitutional rights not to be deprived of life, liberty, or property within due process and to be free of unreasonable searches and seizures under the 4th, 5th and 14th Amendment [sic] to the United States Constitution. The specific manner in which those actions are alleged to have occurred has not been specified in this Count of the pleadings. *Harrington v. Schossow*, 457 N.W.2d 583, 587 (Iowa 1990) concludes that a claim may be made under a 1983 action against an official sued in his individual capacity notwithstanding the inability to sue the State under such action. It therein stated:

> "In order to state a claim for relief under Section 1983, it is necessary that the plaintiff allege that the Defendant's action violated a right secured by the Constitution or laws of the United States

> and that they were undertaken 'under color of State law.' "

The allegations of the Petition support a claim. The determination must then be made whether or not there is a showing of non-existence of material fact by the moving party. *Behr v. Meredith Corp.*, 414 N.W.2d 339, 341 (Iowa 1987).

The Court is confronted with the problem that there is no resisting affidavits from the Plaintiff except the request that the Court take judicial notice of testimony in a related administrative proceedings in which H. L. Hollander was not a party. He testified as a witness in that case.

The burden, however, is upon the movant. The claim of deprivation of the constitutional right not to be deprived of life, liberty, or property is seldom capable of summary adjudication when the issue is not a jurisdictional one. It requires proof of a negative – that there was no deprivation of constitutional rights. Notwithstanding the lack of adequate affidavit resisting this issue by the Plaintiff, there is a material fact dispute on this subjective issue which must be resolved by trial.

The Motion for Summary Judgment with respect to the allegations of the Plaintiff against H. L. Hollander in Count VI of Division II should be overruled.

IT IS HEREWITH ORDERED:

The Motion for Summary Judgment of the Defendants in the above-entitled proceedings against the Plaintiff is sustained in all respects, except as to the allegations

of Count VI of Division II. Judgment is entered accordingly.

Dated this 3rd day of October, 1990.

/s/ Carl E. Peterson
CARL E. PETERSON, JUDGE
SECOND JUDICIAL DISTRICT

Copies to:

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